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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 563

R. R. GROVEY,

Petitioner,

vs.

ALBERT TOWNSEND.

PETITION FOR WRIT OF CERTIORARI TO JUSTICE COURT, PRECINCT No. 1, POSITION No. 2, HARRIS COUNTY, TEXAS.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, R. R. Grovey, hereby respectfully applies for a Writ of Certiorari, whereby the Justice Court, Precinct No. 1, Position No. 2, in and for the County of Harris and State of Texas, will be required to certify to this Honorable Court for its review the transcript of record in the case entitled "R. R. Grovey, plaintiff, vs. Albert Townsend, defendant, No. 63,915," in which the said Justice Court, on September 24, 1934, sustained the general demurrer of respondent to petitioner's petition, dismissed petitioner's suit, and rendered judgment in favor of respondent, and in which said Justice Court on September 25, 1934, over-

ruled the petitioner's motion for a new trial; petitioner's petition and action being to recover damages from respondent for his wrongful refusal to permit petitioner to cast an absentee vote in a statutory Democratic primary election, for which respondent was the statutory official in charge of absentee voting. In support hereof, under Section 344 (b), Title 28, U. S. Code, Judicial Code, Section 237 (b), your petitioner respectfully alleges:

First. This is the fourth time that a Negro citizen has found it necessary to apply to this Honorable Court for the protection of his civil right to vote in the statutory Democratic primary elections of Texas.

(*a*) In *Love* v. *Griffith* (decided October 20, 1924), 266 U. S. 32, the question was moot before it reached this Court, but this Court said that "If the case stood here as it stood before the court of first instance it would present a grave question of constitutional law and we should be astute to avoid hindrances in the way of taking it up."

(*b*) In *Nixon* v. *Herndon* (decided March 7, 1927), 273 U. S. 536, the question was not moot and the Negro's constitutionally protected civil right to vote in the statutory Democratic primary elections of Texas was established beyond doubt and a Texas statute which sought to destroy the right was declared unconstitutional, this Court saying that "it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the *right* set up in this case." (Italics ours.)

(*c*) *Nixon* v. *Condon* (decided May 2, 1932), 286 U. S. 73, arose when, taking refuge behind the rule that the Fourteenth and Fifteenth Amendments are restraints upon the States and not upon private individuals, another Texas statute passed as was said because of "an emergency and imperative public necessity" created by *Nixon* v. *Herndon*, *supra*, "lodged the power" (as this Court found in *Nixon*

v. *Condon, supra*) in the State Democratic Executive Committee of Texas to deprive Negroes of their civil right to vote in the Texas statutory Democratic primary elections. This Court held that the State Committee was an organ "of the State itself" and laid down the broad rule that (p. 88) "Whether, in given circumstances, parties or their committees are agencies of government within the Fourteenth or the Fifteenth Amendment is a question which this Court will determine for itself. It is not concluded upon such an inquiry by decisions rendered elsewhere."

(*d*) Following the second *Nixon* case, Negroes were again deprived of their civil right to vote in the statutory Democratic primary elections of Texas, and the instant case presents the fourth challenge to the constitutionality of that deprivation, under the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

Resolution Involved.

Second. In *Nixon* v. *Condon, supra,* as proof that the State Democratic Executive Committee of Texas had no power by virtue of its being to say what citizens could become Democrats and what citizens could not, this Court made the following statement at page 84: "Whatever inherent power *a State political party* has to determine the content of its membership resides in the State convention. Bryce, Modern Democracies, Vol. 2, p. 40." (Italics ours.)

Assuming that the Democratic Party is a "state political party"—which petitioner alleges that it is not—and placing a favorable significance upon the word "Whatever" in the above quotation from this Court, the State Democratic Convention of Texas promptly passed, on May 24, 1932, the following resolution (R. 7):

> "Be it resolved, that all white citizens of the State of Texas who are qualified to vote under the Constitu-

tion and Laws of the State shall be eligible to membership in the Democratic party and as such eligible for participation in its deliberations" (the primaries). See *Bell* v. *Hill*, 74 S. W. (2d) 113, and *Mason* v. *Committee*, 74 S. W. (2d) 326, where this difference in reading of resolution may be found.

State Constitutional Provisions and Court Decisions Challenged in Instant Case.

Third. Since its adoption and the deprivation under its authority of the legal right of Negroes to vote in the statutory Democratic primary elections of Texas, the above resolution has been before two Texas Courts of Civil Appeals and the Supreme Court of Texas. *County Democratic Executive Committee* v. *Booker*, 53 S. W. (2d) 123; *Bell* v. *Hill*, 74 S. W. (2d) 113; and *Mason* v. *County Democratic Executive Committee*, 74 S. W. (2d) 326. These cases are tacitly relied upon by the court below as authority for the judgment in the instant case.

(*a*) In the Booker Case (Cobbs, J., dissenting) the Court of Civil Appeals at San Antonio, through Special Justice Searcy, thought that its decision upholding the resolution was "in line with the opinion of the Supreme Court of the United States in *Nixon* v. *Condon*." Expressing the same thought the late Chief Justice Fly, in a concurring opinion, said (p. 129) that *Nixon* v. *Condon*, "after destroying the ship of party power and rule, threw out a spar upon which the party might keep its head above the tumultous political sea of 1932, that spar being the convention of the party, not acting on any State mandate, but on its unfettered volition." But this spar was discovered only after the Chief Justice had thus written (p. 129): "However much the logic and strength of the minority opinion in the case of *Nixon* v. *Condon*, herein cited, may excel those of the majority opinion, however much we may differ with the

majority opinion, representing only five of the nine judges of the Federal Supreme Court, still it is the law of the land, and this Court will endeavor to follow not only its spirit but its letter."

(*b*) The *Mason* case merely followed the *Booker* and *Bell* cases.

(*c*) In the *Bell* case, decided July 20, 1934, the Supreme Court of Texas gave its approval to the *Booker* case, but expressly disagreed with this Court's decision in *Nixon* v. *Condon, supra,* saying through Chief Justice Cureton (p. 121):

> "Justice Cardozo held that a proper construction of this statute was that the power to declare the membership of the party had been conferred upon the State Committee by law, and that the effect of this was to make the committee a state agency, which could not discriminate between the white and Negro races in fixing the membership of the Democratic Party. *With this construction of this Texas statute we cannot agree.* The State Executive Committee of the Democratic Party in Texas is just what its name implies—a committee clothed with executive power to carry out the will of the party." (Italics ours.)

The Supreme Court of Texas further held that, if this Court's construction of Article 3107 of the Revised Civil Statutes of Texas should prevail upon the proposition of whether the State Democratic Executive Committee was an agency of Government within the 14th or 15th Amendment (which this Court said in *Nixon* v. *Condon* it "will determine for itself"), then said statute would be "plainly void, because in violation of sections 27 and 2 of the Bill of Rights" (Article 1) of the Texas Constitution, which read as follows (R. 10):

> "Sec. 2. All political power is inherent in the people, and all free governments are founded on their

authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a Republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient."

"Sec. 27. The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance."

The Supreme Court of Texas further held (p. 119) that the power thus to discriminate against Negroes was guaranteed and protected by "the first section of the Bill of Rights, the First Amendment to the Constitution of the United States."

Petitioner challenges said Sections 2 and 27 of Article 1 (Bill of Rights of the Constitution of Texas, thus construed, and the decisions construing them, as violating petitioner's rights under the Fourteenth and Fifteenth Amendments to the Constitution of the United States (R. 10).

Petitioner's Injury.

Fourth. On July 28, 1934, a statutory Democratic primary election was held in the State of Texas, of the same character as the ones involved in *Nixon* v. *Herndon* and *Nixon* v. *Condon, supra,* at which nominations, equivalent to election, were made for United States Senator, United States Congressman, and state, district, county and precinct officers.

In obedience to the mandate of Article 2956 of the Revised Civil Statutes of Texas, absentee voting was being conducted on July 9, 1934, by the respondent, Albert Townsend, who was the duly elected, qualified, and acting county clerk of Harris County, Texas. Said article 2956 is quoted

in full in petitioner's original petition (R. 4), the pith of which reads:

> "Art. 2956. Absentee Voting. Any qualified elector, as defined by the laws of this State, who expects to be absent from the County of his or her residence on the day of election may vote subject to the following conditions, towit: At some time, not more than twenty (20) days nor less than three (3) days prior to the date of such election, such elector shall make his or her personal appearance before the Clerk of the County of his or her residence and shall deliver to such Clerk his or her poll tax receipt or exemption certificate entitling him or her to vote at such election, and said Clerk shall deliver to such elector one ballot which has been prepared in accordance with the law for use in such election . . . The provisions of this article shall apply to all elections, including General, Special, and Primary elections.

The petitioner was on said July 9, 1934, a "qualified elector, as defined by the laws of" Texas; was a member of and believer in the tenets of the Democratic Party; expected to be absent from his county on said election day; made his personal appearance before the respondent and delivered to respondent petitioner's poll tax receipt entitling petitioner to vote in the election involved in this case; but respondent refused to deliver to petitioner a ballot or to permit petitioner to vote in said election, respondent giving as his sole reason and justification the fact that petitioner was a Negro, and that under the above quoted resolution of the State Democratic Convention of Texas and under instructions from the County Democratic Executive Committee of Harris County, Texas, petitioner was ineligible to vote in said election, solely and only because petitioner was a member of the Negro race.

Instant Suit Brought.

Fifth. Feeling himself aggrieved and damaged by his said disenfranchisement in the sum of Ten Dollars (ten times the damages awarded by the jury in *Nixon* v. *Herndon, supra;* ten times the amount agreed as the measure of damages by the parties in *Nixon* v. *Condon, supra;* and twice the amount of damages awarded upon a trial to the United States District Judge without a jury in *Nixon* v. *McCann,* No. 1660 Law, U. S. District Court, Western District of Texas, decided February 7, 1934, but not officially reported; twice the amount of damages awarded by the jury in *Bliley* v. *West,* 42 F. (2d) 101; (see certified copies of judgments in *Nixon* cases printed herewith as Appendices 1, 2, and 3), petitioner, on September 10, 1934, brought suit for ten dollars ($10.00) damages in Justice Court, Precinct No. 1, Position No. 2, Harris County, Texas. Because of the amount involved, the Justice Court was the only Texas Court having jurisdiction; and no appeal lies from the judgment in such cases. Article 5, Section 19, Constitution of Texas; Articles 2385 and 2454, Revised Civil Statutes of Texas.

Petitioner filed a petition in said action in the Justice Court (R. 1) setting out the matters and things set forth above, and in addition thereto, the following pertinent facts:

1. That the petitioner, R. R. Grovey, is and was on July 9, 1934, a natural born citizen and resident of the United States and the State of Texas, was 44 years of age, a member of the Negro race, had resided in Harris County, Texas, for 18 years and in his voting precinct No. 85 for 4 years, next preceding the holding of the statutory Democratic primary election involved in this case, had paid his poll tax as required by law and held his official receipt there-

for, was a duly qualified elector under the laws of the United States and the State of Texas, was subject to none of the disqualifications for voting provided for under the constitution and laws of Texas, and was a member of and believer in the tenets of the Democratic Party (R. 1).

2. That Articles 3101 and 3102 of the Revised Civil Statutes of Texas (quoted in the petition, R. 2) required the holding of a statutory Democratic primary election on July 28, 1934; that said election was held pursuant to the mandatory requirements of said articles, and that petitioner had a legal right to vote therein, which right was protected by the Fourteenth and Fifteenth Amendments to the Constitution of the United States (R. 3).

3. That Article 3107 of the Revised Civil Statutes of Texas (construed by this Court in *Nixon* v. *Condon, supra*) provides in part that "No person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party."

That the immunities thus granted to the classifications of "former political views or affiliations" and "membership or non-membership in organizations other than the political party" have been held valid by the Supreme Court of Texas in *Love* v. *Wilcox*, 119 Texas 256, 28 S. W. (2d) 515; and that the failure of the Supreme Court of Texas to extend the same immunity to the classification of "race and color" in the *Bell* v. *Hill* case, *supra*, was a denial to petitioner and all other qualified Negro voters of the due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment and an abridgement of petitioner's right to vote in violation of the Fifteenth Amendment to the Constitution of the United States (R. 9-10).

That the decision of the Supreme Court of Texas in the *Bell* v. *Hill* case was the culmination of a consistent course of statutory enactments and judicial decisions, since the original passage of the statutory primary election laws of Texas, under which the State of Texas has deprived the managers of said elections of all power to fix qualifications for voting therein, inconsistent with the qualifications for electors provided in the constitution and laws of Texas, except in the one instance where the managers of such elections have been authorized and permitted and protected by said "course of legislative enactment and judicial decisions in excluding Negroes from voting in said statutory primary elections." (R. 11.)

4. "That the Democratic Party is a national organization, and that the Democratic Party has not passed any rule or resolution or order excluding Negroes, and has not authorized any of its agencies or branches to pass any resolution, rule, or order excluding Negroes, or forbidding Negroes from becoming members of the Democratic Party, and that no State convention of the Democratic Party has the power by virtue of its being to pass any such rule, resolution, or order, and that the Democratic Party has never conferred power upon the State Democratic Convention of Texas to pass any such resolution, rule, or order." (R. 11.)

5. That the respondent, Albert Townsend, is a State officer of the State of Texas, who exercises only functions delegated to him by the laws of the State and whose compensation and salary are paid out of the tax money to which petitioner has contributed and is required to contribute by the laws of the State of Texas (R. 12).

6. That the State Democratic Convention of Texas and the County Democratic Executive Committee of Harris

County, Texas, are agencies of government within the meaning of the Constitution of the United States and *Nixon* v. *Condon, supra* (R. 12).

Demurrer to Petition.

Sixth. The respondent, Albert Townsend, filed his demurrer to petitioner's petition as follows: "The defendant demurs generally to the plaintiff's petition and says it is insufficient in law and states no cause of action . . . (R. 13.)

Decision of Court.

Seventh. On September 24, 1934, the Justice Court entered its judgment sustaining the general demurrer and dismissing petitioner's petition, and entering judgment for respondent (R. 14).

Motion for New Trial.

Eighth. On September 25, 1934, petitioner filed his motion for a new trial in which he urged upon the Justice Court in detail that said judgment denied petitioner the due process of law and equal protection of laws guaranteed by the Fourteenth Amendment and abridged petitioner's right to vote in violation of the Fifteenth Amendment to the Constitution of the United States (R. 15).

The motion for new trial was overruled on September 25, 1934. (R. 18.)

No Appeal Permitted.

Ninth. The amount involved being less than $20.00 no appeal or review is permitted (either as a matter of right or as a matter of discretion) to any higher State court of the State of Texas.

Texas Constitution, Article 5, Section 19.
Revised Civil Statutes of Texas, Article 2454.
Gulf etc. R. Co. v. *Rawlings*, 80 Texas 579, 16 S. W. 430.
Hudson v. *Smith* (Tex. Civ. App.), 133 S. W. 486.
Arrington v. *People's Supply Co.* (Tex. Civ. App.) 52 S. W. (2d) 678.

Grounds for Writ.

Tenth. Your petitioner respectfully submits that the judgment in the Justice Court sustaining the demurrer to his petition, dismissing his action, and giving judgment for the respondent, and the order overruling petitioner's motion for a new trial, were wholly erroneous for the reasons, among others; specifically stated in petitioner's motion for a new trial in the Justice Court, contained in the record (R. 15-18), and that this Honorable Court should grant the writ of certiorari prayed for herein in order to review and reverse the action of the court below.

Among the grounds which here exist for granting this writ, your petitioner respectfully invites attention to the following specified in Rule 38 (Former Rule 35), paragraph 5 (*a*) of the rules of this Court:

> "(*a*) Where a State court has decided a Federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

The existence of the grounds for granting the writ prayed for will become apparent during the course of the argument in the supporting brief, annexed hereto and made a part hereof.

Wherefore, your petitioner prays this Honorable Court to issue a Writ of Certiorari directing the Justice Court,

Precinct No. 1, Position No. 2, Harris County, Texas, to certify the record in this case to this Court for review and determination.

Dated December 4, 1934.

R. R. GROVEY,
Petitioner.

J. ALTON ATKINS,
CARTER W. WESLEY,
Petitioner's Counsel.
Office and Post Office Address:
409 Smith Street, Houston, Texas.

A. S. WELLS,
F. S. K. WHITTAKER,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 563

R. R. GROVEY,

Petitioner,

vs.

ALBERT TOWNSEND,

BRIEF OF PETITIONER ON APPLICATION FOR WRIT OF CERTIORARI.

Decision Below.

The decision below is not reported, but is printed in the Record at pages 14 and 18-19.

Jurisdictional Statement.

(a) *Statutory Provision Believed to Sustain Jurisdiction.*

First. In Texas, there are three courts of original jurisdiction: District Courts, County Courts, and Justice Courts; District Courts and County Courts also have certain appellate jurisdiction. The jurisdiction of these courts, respectively, is provided for in Article 5, Sections 8, 16, and 19 of the Texas Constitution; and Articles 1906-1911, 1949-

1960, and 2385-2387, 2454, 2460 of the Revised Civil Statutes of Texas. (These provisions are printed herewith as Appendices 4, 5, 6, and 7, respectively.)

Second. The Justice Court, because of the amount involved, was the only court having jurisdiction of the instant case under the constitution and laws of Texas. See Appendices 4, 5, 6, and 7.

Third. Because of the amount involved, no appeal was allowed from the judgment in the instant case to any other court, by the constitution and laws of Texas, either as of right or by permission of any court or judge, after application therefor. See Appendices 4, 5, 6, and 7; *Gulf, etc. R. Co.* v. *Rawlings*, 80 Texas 579, 16 S. W. 430; *Arrington* v. *People's Supply Co.*, (Tex. Civ. App.) 52 S. W. (2d) 678; 26 Texas Jurisprudence, Sec. 82, p. 879.

The law in Texas with regard to appeals from Justice Court is stated very clearly in *Hudson* v. *Smith*, (Tex. Civ. App.) 133 S. W. 486 (writ of error denied by Supreme Court of Texas, see note 133 S. W. 486), as follows (p. 488):

> "Neither the Constitution nor the law gives the right of appeal from judgments of the justices' courts when the amount in controversy is not more than $20, exclusive of costs. An appeal is not a matter of right, but the right is conferred by the Constitution or statute. In the absence of such grant, the right does not exist. A judgment from which there can be no appeal is conclusive between the parties, unless absolutely void. The amount in controversy in the case wherein the judgment is sought to be enjoined was less than $20, and therefore within the exclusive jurisdiction of the court which rendered it, from which no appeal could be taken."

The appellate jurisdiction of the Courts of Civil Appeals and the Supreme Court of Texas is found in Article 5,

Sections 3 and 6 of the Constitution of Texas, and Articles 1728 and 1819 of the Revised Civil Statutes of Texas. These provisions are printed herewith as Appendices 8 and 9 respectively.

Fourth. The record thus disclosing that "a final judgment or decree has been rendered or passed by the highest court" of Texas "in which a decision could be had" in the instant case, this Court has jurisdiction to review the decision below upon certiorari under Section 237 (*b*) of the Judicial Code, Section 344 (*b*) of the United States Code; because:

(1) There are drawn in question provisions of the Constitution of the State of Texas, which, as construed by the Supreme Court of Texas in *Bell* v. *Hill*, 74 S. W. (2d) 113, to authorize the disenfranchisement of which petitioner complains, are alleged to violate petitioner's rights under the Fourteenth and Fifteenth Amendments to the Constitution of the United States (R. 10). These Texas constitutional provisions thus drawn in question are Sections 2 and 27 of Article 1 and they read as follows:

> "Sec. 2. All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a Republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient."
>
> "Sec. 27. The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance."

The court below in the case at bar sustained the validity of these Texas constitutional provisions so construed.

(2) Petitioner set up and claimed below that respondent had deprived him of his civil right to vote in the statutory Democratic primary election involved in this case; that this civil right to vote was protected against infringement by the Fourteenth and Fifteenth Amendments to the Constitution of the United States; and that this civil right had been denied and abridged by respondent as an officer of the State of Texas, and by agencies of government within the meaning of *Nixon* v. *Condon*, 286 U. S. 73 (R. 3, 8, 12).

These Federal claims were denied by the court below.

(b) *Date of Judgment to be Reviewed.*

The judgment which petitioner prays this Court to review was entered on September 23, 1934 (R. 14); and petitioner's motion for a new trial was overruled on September 25, 1934 (R. 18-19). The petition for the writ of certiorari was filed December 6, 1934.

(c) *Statement of the Case.*

This case may be described as the sequel to *Nixon* v. *Condon*, 286 U. S. 73.

The petitioner, R. R. Grovey, a Negro citizen of the United States and of the County of Harris and State of Texas, brought this suit in Justice Court, Precinct No. 1, Position No. 2, Harris County, Texas, on September 10, 1934, against the respondent, Albert Townsend, to recover damages for wrongfully depriving petitioner of his legal right to cast an absentee vote in the statutory Democratic primary election involved in this case (R. 1).

Petitioner was a duly qualified elector under the Constitution and laws of the United States and of the State of Texas, and was a member of and believer in the tenets of the Democratic Party (R. 1).

The respondent, Albert Townsend, was on the 9th day of July, 1934, the duly elected, qualified, and acting county

clerk of Harris County, Texas, and as such was on said date conducting absentee voting for the election involved in this case, pursuant to the mandates of Article 2956 of the Revised Civil Statutes of Texas (R. 3-6).

The statutory Democratic primary election involved in this case and mentioned above was held on July 28, 1934, pursuant to the mandatory requirements of Articles 3101 and 3102 of the Revised Civil Statutes of Texas (R. 3).

On said July 9, 1934, petitioner, being a qualified elector, as defined by the laws of Texas, except that he was a Negro, presented himself in manner and form as required by said Article 2956 of the Revised Civil Statutes of Texas, fully complied with said Article 2956, and requested of respondent an absentee ballot; but respondent refused to give the ballot and deprived respondent of his right to cast an absentee vote in said election (R. 6-7).

The respondent gave as his sole and only reason for denying the ballot and the vote the fact that petitioner was a Negro, and that Negro voters, otherwise qualified, were disenfranchised in said election by virtue of instructions to that effect from the County Democratic Executive Committee of Harris County, Texas, and by virtue of a resolution adopted May 24, 1932, by the State Democratic Convention of Texas—meeting pursuant to Article 3167 of the Revised Civil Statutes of Texas—which resolution reads as follows (R. 7):

> "Be it resolved, that all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the State shall be eligible to membership in the Democratic Party and as such, entitled to participate in its deliberations" (the primaries). See *Bell* v. *Hill*, 74 S. W. (2d) 113, 114, and *Mason* v. *County Democratic Executive Committee*, 74 S. W. (2d) 326, for variations in wording of resolution.

Petitioner in his original petition below challenged in detail the authority set up by respondent for his acts in depriving petitioner of his right to cast the absentee vote as being a violation of petitioner's rights under the due process and equal protection clauses of the Fourteenth Amendment and as abridging petitioner's right to vote under the Fifteenth Amendment to the Constitution of the United States (R. 8-11). The contentions of petitioner in this regard will appear more fully below in this brief.

Petitioner alleged that the Democratic Party is a national political party, which does not exclude Negroes from membership in it; and that the Democratic Party has never authorized any of its branches or agencies, more particularly the State Democratic Convention of Texas, to exclude Negroes from membership in the Democratic Party (R. 11).

Petitioner alleged that nominations, equivalent to election, were made in the statutory Democratic primary election involved in this case, not only for State and county officers, but also for United States Senator and Congressman (R. 11).

Petitioner alleged that the respondent, Albert Townsend, was a State officer, functioning only under State laws, whose salary was paid out of public funds; and that the State Democratic Convention of Texas and the County Democratic Executive Committee of Harris County, Texas, are agencies of government within the meaning of the Fourteenth and Fifteenth Amendments to the Constitution of the United States and *Nixon* v. *Condon*, 286 U. S. 73 (R. 12).

Respondent filed a general demurrer to petitioner's petition (R. 13).

The court below sustained the general demurrer and dismissed petitioner's action (R. 14).

In due course, petitioner filed a motion for a new trial, in which he again raised the Federal questions set up in

his original petition, and also challenged the judgment itself as depriving petitioner of his rights under the Fourteenth and Fifteenth Amendments. (R. 15-18). All of these Federal questions are presented more fully below in this brief.

The court below overruled the motion of petitioner for a new trial (R. 18-19).

(d) *Cases Believed to Sustain Jurisdiction.*

Certiorari was granted in *Nixon* v. *Condon*, 286 U. S. 73, to the Circuit Court of Appeals for the Fifth Circuit to review identical Federal questions involved in this case. The identical Federal claim sustained by this Court upon the merits in *Nixon* v. *Condon, supra,* was denied by the court below in the case at bar (R. 14, 18).

The authorities are unanimous that this Court has jurisdiction to review a final judgment of an inferior State court, where no appeal of any kind lies from that inferior court's judgment.

The general proposition is stated in the opinion of this Court in *Kentucky* v. *Powers*, 201 U. S. 1, 37, as follows:

> "But, it is said that the action of the trial court in refusing to quash the indictment or the panel of petit jurors, although the motion to quash was based on Federal grounds, cannot, under the laws of Kentucky, be reviewed by the court of appeals, the highest court of that commonwealth. If such be the law of Kentucky, as declared by the statutes and by the court of appeals of that commonwealth, then, after the case is disposed of in that court by final judgment, in respect of the matters of which, under the local law, it may take cognizance, a writ of error can run from this court *to the trial court* as the highest court of Kentucky *in which a decision of the Federal question could be had;* and this court in that event, upon writ of error, reviewing the final judgment of the trial court, can ex-

> ercise such jurisdiction in the case as may be necessary to vindicate any right, privilege, or immunity specially set up or claimed under the Constitution and laws of the United States, and in respect of which the decision of the trial court is made final by the local law; that is, it may re-examine the final judgment of the trial court so far as it involved and denied the Federal right, privilege, or immunity asserted. This must be so, else it will be in the power of a state to so regulate the jurisdiction of its courts as to prevent this court from protecting rights secured by the Constitution, and improperly denied in a subordinate state court, although specially set up and claimed."

In the case of *The Moses Taylor* v. *Hammons*, 18 L. Ed. 397, suit was, as in the instant case, brought in a justice court. Under the California law, the State in which the suit was brought, an appeal lay to the county court, whose judgment, on account of the amount involved, was non-appealable. This Court reviewed and reversed the judgment of the county court, saying upon the jurisdictional question (p. 400):

> "The decision of the county court was the decision of the highest court in the State which had jurisdiction of the controversy. From that court, therefore, the case is brought here by writ of error."

Other cases upholding the same principle are:

Downham v. *Alexandria*, 19 L. Ed. 807.
Missouri, etc. v. *Elliott*, 184 U. S. 530.
Western Union v. *Hughes*, 203 U. S. 505.

Section 3214 of Hughes' Federal Practice states the broad principle as follows:

> "It makes no difference how minor or unimportant the state court may be if its decision is final and there is no higher court having jurisdiction."

Summary of Grounds Upon Which Writ Is Sought.

Petitioner prays for a writ of certiorari for the following reasons (Paragraph 5a of Rule 38, former Rule 35, of this Court) discussed below in this brief:

(1) The State court below has decided a Federal question of substance not theretofore decided by this Court—a Federal question expressly left open by this Court, in *Nixon* v. *Condon*, 286 U. S. 73, "until decision becomes necessary."

(2) The State court below has decided Federal questions of substance in a way probably not in accord with the following applicable decisions of this Court:

Nixon v. *Herndon*, 273 U. S. 536.
Nixon v. *Condon*, 286 U. S. 73.
Travis v. *Yale & Towne Mfg. Co.*, 252 U. S. 60.
Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 540.
United States v. *Reese*, 92 U. S. 214.

(3) Because of their importance to the public the questions involved in this case should be settled by this Court. Nearly a million Negroes are now disenfranchised in Texas, and about ten millions in the South, chiefly, as a matter of common and general knowledge, through the instrumentality of statutory Democratic primary elections, equivalent to general elections, like the one involved in this case; and such disenfranchisement is the real purpose of these statutory primary creations. Deciding expressly to the contrary, the Federal question ruled upon by this Court in *Nixon* v. *Condon*, *supra*, the Supreme Court of Texas has held in *Bell* v. *Hill*, 74 S. W. (2d) 113, that this disenfranchisement of the nearly million Negroes of Texas is not only legal, but that it is guaranteed and protected both by the Constitution of Texas and the Constitution of the United States. Two Texas Courts of Civil Appeals

have also recently held that this disenfranchisement must stand, in spite of *Nixon* v. *Condon, supra.* The court below in the instant case has followed the Texas appellate courts, and its jurisdiction was exclusive and its judgment final and non-appealable.

If this Court declines to exercise its discretion to take the jurisdiction in this case which by all the authorities it has, not only the State of Texas, but the entire South will obviously consider itself entrenched in the position which the Texas courts have already expressed—that the disenfranchisement of ten million Negroes as now practiced is in full accord with the decisions of this Court. Color should not be lent to that position without a full hearing upon the merits in this Court.

ARGUMENT.

Point Number One.

The State court below has decided a Federal question of substance not theretofore decided by this Court—a Federal question expressly left open by this Court in *Nixon* v. *Condon,* 286 U. S. 73, "until decision becomes necessary."

(1) The Federal question referred to in this point was stated and expressly left open by this Court in *Nixon* v. *Condon, supra,* in the following words (p. 83):

> "Whether a political party in Texas has inherent power today without restraint by any law to determine its own membership, we are not required at this time either to affirm or to deny. The argument for the petitioner is that, quite apart from the article in controversy, there are other provisions of the Election Law whereby the privilege of unfettered choice has been withdrawn or abridged (citing, e. g. Articles 2955, 2975, 3100, 3104, 3105, 3110, 3121, Revised Civil Laws); that nomination at a primary is in many circumstances

required by the statute if nomination is to be made at all (Article 3101); that parties and their representatives have become the custodians of official power (Article 3105); and that, if heed is to be given to the realities of political life, they are now agencies of the State, the instruments by which government becomes a living thing. In that view, so runs the argument, a party is still free to define for itself the political tenets of its members, but to those who profess its tenets, there may be no denial of its privileges.

"A narrower base will serve for our judgment in the cause at hand. Whether the effect of Texas legislation has been to work so complete a transformation of the concept of a political party as a voluntary association, we do not now decide. Nothing in this opinion is to be taken as carrying with it an intimation that the court is ready or unready to follow the petitioner so far. *As to that, decision must be postponed until decision becomes necessary.*" (Italics ours.)

Petitioner made the following allegation in his original petition below (R. 11):

"Plaintiff further alleges that by a consistent course of statutory enactment and judicial decisions, since the original passage of the statutory primary election laws of Texas in 1903, the State of Texas has deprived the managers of such elections of all power to fix qualifications for voting therein, inconsistent with the qualifications for electors provided in the constitution and laws of the State of Texas, except in the one instance where the party managers have been authorized and permitted and protected by said course of legislative enactment and judicial decisions in excluding Negroes from voting in said statutory primary elections."

The judgment below sustaining the general demurrer and dismissing petitioner's action decided this Federal question of substance which this Court "postponed until decision becomes necessary," in *Nixon* v. *Condon, supra,* and decided it contrary to the contention of petitioner.

Decision of that Federal question by this Court has now become necessary, and this Court should grant a review of the judgment below for that purpose..

(2) That "the effect of Texas legislation has been to work so complete a transformation of the concept of a political party as a voluntary association," so far as the primary election laws of Texas are concerned, seems to petitioner to be now beyond question.

The Supreme Court of Texas itself refers to such an election as a "statutory primary election." See *Sterling* v. *Ferguson*, 53 S. W. (2d) 753, 760.

The present nature of the statutory Democratic primary election in Texas is, of course, not an unmixed question of law. It is a question of history, fact, and law. Whether such an election is now an agency of government within the Fourteenth and Fifteenth Amendments, this Court has held, in *Nixon* v. *Condon*, *supra*, that it "will determine for itself."

In determining the historical and factual aspects of such Federal question, petitioner believes that the findings of the United States District Judge, who presides over the Federal Judicial District in which the case at bar arose, are entitled to great weight. In the case of *White* v. *The County Democratic Executive Committee*, 60 F. (2d) 973, United States District Judge Kennerly, discussing the identical resolution involved in the case at bar, gave the following significant historical summary (p. 974):

> "Respondents, however, insist that the Democratic Party's power with respect to and its convention's powers to pass, such resolution, are inherent, possessed long prior to the enactment of article 3107, and in no manner derived from the State of Texas. That this was true prior to the enactment of laws in Texas regulating the political parties, etc., there is little, if any, doubt. That it is not true now is certain. For a

period of more than twenty-five years, the Democratic Party in Texas has, from time to time, accepted grants of power from the State, surrendered its own inherent powers, and caused to be passed laws abridging its inherent powers, until, as was said in *Briscoe* v. *Boyle* (Tex. Civ. App.) 286 S. W. 275, 276, the party has little or no discretion in the management of its party affairs. Unlike Moses, who refused to be known as the son of Pharoah's daughter, the Democratic Party in Texas has, over a period of twenty-five years, chosen to be known as a child and agency of the State of Texas, abandoning its own inherent powers, and choosing to conduct its affairs under grants of power from the State.

"It is only necessary to review the history of legislation in Texas, respecting political parties, Acts of 28th Legislature (1903), c. 101, § § 82 to 107, p. 148, 12 Gammel's Laws of Texas; Acts of 29th Legislature (1905), 1st Called Sess., c. 11; § § 102 to 195, p. 543, 12 Gammel's Laws of Texas; Texas Revised Civil Statutes 1911, articles 3084 to 3175 and amendments; Texas Revised Civil Statutes 1925, articles 3100 to 3173 and amendments (Vernon's Annotated Revised Civil Statutes of Texas, articles 3100 to 3173), and to review the decisions of the higher courts of Texas, construing such legislation, *Love* v. *Wilcox*, 119 Tex. 256, 28 S. W. (2d) 515, 523; *Briscoe* v. *Boyle* (Tex. Civ. App.) 286 S. W. 275; *Koy* v. *Schneider*, 110 Tex. 369, 218 S. W. 479, 221 S. W. 880; *Westerman* v. *Mims*, 111 Tex. 29, 227 S. W. 178; *Walker* v. *Hopping*, (Tex. Civ. App.) 226 S. W. 146; *Dewees* v. *Stevens*, 105 Tex. 356, 150 S. W. 589; *Mays* v. *Cobb*, 100 Tex. 131, 96 S. W. 1079; *Gilmore* v. *Waples*, 108 Tex. 167, 188 S. W. 1037; *Ashford* v. *Goodwin*, 103 Tex. 491, 131 S. W. 535, Ann. Cas. 1913 A, 699; *Morris* v. *Mims*, (Tex. Civ. App.) 224 S. W. 587; *Waples* v. *Marrast*, 108 Tex. 5, 184 S. W. 180, L. R. A. 1917 A, 253; *Hamilton* v. *Munroe*, 116 Tex. 153, 287 S. W. 306; *Nicholson* v. *Scurry*, 119 Tex. 250, 28 S. W. (2d) 512; *Holzschuber* v. *Wurzbach* (Tex. Civ. App.), 286 S. W. 289; *Love* v. *Buckner* (Tex.

> Sup.), 49 S. W. (2d) 425, to show this to be true. Add to this the provisions of the present laws, regulating in detail the affairs of political parties, and it becomes unanswerable that the convention passing this resolution was an agency of the state, in the same manner and to the same extent as the state Democratic executive committee. *Nixon* v. *Condon, supra.* The convention itself is a creation of a statute which fixes the time of its meeting, the purpose of its meeting and prescribes in detail the manner of choosing those who participate therein. Article 3167, Texas Revised Civil Statutes 1925."

It is proper for this Court to take judicial notice of the facts of political history set forth in the excerpt from Judge Kennerly's opinion, *supra*. *Underhill* v. *Hernandez*, 168 U. S. 250.

It is not possible within the limits of a brief upon petition for a writ of certiorari to review all of the cases in the Texas appellate courts to prove that Judge Kennerly's historical and factual analysis is true. If this case is heard upon the merits, petitioner believes that he will be able, by an analysis of all of the pertinent Texas cases, to show, not only that Judge Kennerly's historical and factual summary is correct, but that in every instance the Texas appellate courts have denied to the managers of the statutory Democratic primary elections of Texas power to fix qualifications and tests for participation therein inconsistent with the qualifications and tests fixed by the constitution and laws of Texas, except in the one instance where the managers of the statutory Democratic primary elections have been "guaranteed" the power to exclude Negroes from such participation.

This contention was set up by petitioner in the court below and was denied (R. 11, 17).

An indication that such a transformation has occurred in Texas, so far as the statutory Democratic primary elec-

tions are concerned, can be demonstrated by reference to three pairs of cases in three different Texas appellate courts.

(1) In *Love* v. *Wilcox*, 28 S. W. (2d) 515, the Supreme Court of Texas held that past party affiliations (the historical test of party loyalty) and membership or non-membership in organizations other than the political party cannot be made qualifications or tests for participation in the statutory Democratic primary election. In *Bell* v. *Hill*, 74 S. W. (2d) 113, the Supreme Court of Texas held that the power to make race and color such a qualification and test is "guaranteed" by the Bill of Rights of Texas.

(2) In *Briscoe* v. *Boyle*, 286 S. W. 275 (cited with approval in *Love* v. *Wilcox*, *supra*, and in *County Democratic Executive Committee* v. *Booker*, *infra*), the Court of Civil Appeals at San Antonio held that "In this State the qualifications of persons entitled to vote in general elections are fixed by the Constitution, and, except those excluded by express restrictive provisions in the statutes (only Negroes were at that time excluded by such express provisions in the statutes), all persons qualified to vote in general elections are entitled to participate in party primary elections." In *County Democratic Executive Committee* v. *Booker*, 53 S. W. (2d) 123, the Court of Civil Appeals at San Antonio held that the exclusion of Negroes from participation in the statutory Democratic primary elections is "in line with the opinion of the Supreme Court of the United States in *Nixon* v. *Condon*."

(3) In *Clancy* v. *Clough*, 30 S. W. (2d) 569, the Court of Civil Appeals at Galveston (the Texas Judicial District in which the case at bar arose) affirmed a judgment of the trial court enjoining the defendant "from placing upon the official ballot any pledge other than that prescribed by the

statute, or one containing the additional word 'white' before the word 'Democrat' in the pledge prescribed by the statute." In *White* v. *Lubbock*, 30 S. W. (2d) 722, the Court of Civil Appeals at Galveston, with more consistency, held that the resolution stricken down by this Court in *Nixon* v. *Condon, supra*, was "a valid exercise" of the "party's inherent power."

POINT NUMBER TWO.

The state court below has decided Federal questions of substance in a way probably not in accord with applicable decisions of this Court.

I. The decision below is not in accord with the applicable decision of *Nixon* v. *Herndon*, 273 U. S. 536.

Nixon v. *Herndon* decided two propositions:

(1) That a qualified Negro citizen has the same civil right to vote in the statutory Democratic primary elections of Texas as he does in a general election of that State.

Mr. Justice Holmes, rendering the opinion of this Court, said that "the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election that may determine the final result" (p. 540).

The reason that allows a recovery for denying a vote at a final or general election is not that the defendant, who may deny the vote, is a state officer, but that plaintiff has a legal civil right to vote in the election and the defendant has a legal duty not to deny that right. Substantial allegations of action by the state may be necessary to give the Federal courts jurisdiction to redress the wrong, but the presence or absence of the state in the picture does not determine the presence or absence of either the right of plaintiff or the duty of the defendant. As said by this Court in the *Civil Rights Cases*, 109 U. S. 3, 17:

> "An individual cannot deprive a man of his right to vote, to hold property, to buy and to sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person or commit murder, or use ruffian violence at the polls or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the State where the wrongful acts are committed."

The Circuit Court of Appeals for the Fifth Circuit has expressed the same view of *Nixon* v. *Herndon* on this first proposition, as that entertained by petitioner.

> "It is of course to be conceded, since the decision in *Nixon* v. *Herndon, supra,* that the right of a qualified citizen to vote extends to primary elections as well as to general elections." *Nixon* v. *Condon,* 49 F. (2d) 1012, 1013.

(2) The second proposition held by *Nixon* v. *Herndon, supra,* was that the Fourteenth Amendment prohibits the state from lending its protection to the deprivation of that civil right to vote in the statutory Democratic primary elections of Texas, and a Texas statute seeking to do this was stricken down as being unconstitutional.

Both of the propositions of *Nixon* v. *Herndon* are present in the instant case. That the civil right to vote in the statutory Democratic primary election involved in this case has been denied will not and cannot be questioned. Petitioner so alleged (R. 7) and respondent's general demurrer so admits (R. 13).

That the state of Texas has participated in and given its protection to the deprivation of petitioner's civil right to

vote in the statutory Democratic primary election involved in this case is likewise clear.

(a) It cannot be disputed that the respondent, who denied the vote, was a state officer. His office of county clerk is created by the Texas constitution (Art. 5, sec. 20). His powers and duties are fixed by statute. Chapter Two, Title 41, Articles 1935-1948, Revised Civil Statutes of Texas. His compensation is fixed by statute and comes out of public funds: Articles 3883, 3932, and 1644 of the Revised Civil Statutes of Texas. His powers and duties as the sole conductor of absentee voting in Harris County, Texas, are wholly fixed by statute. Article 2956 of the Revised Civil Statutes of Texas. Indeed, absentee voting was unknown in Texas prior to its creation by statute. See *Sterling* v. *Ferguson* (Tex. Sup.), 53 S. W. (2d) 753, 760.

(b) The judgment of the court below denying to petitioner, on account of his race and color alone, redress for the deprivation of his civil right to vote in the statutory Democratic primary election involved in this case is just as much a protection of the deprivation by the State of Texas as was the statute stricken down by this Court in *Nixon* v. *Herndon, supra.*

That State judicial decisions are as much within the prohibition of the Fourteenth and Fifteenth Amendments as legislative enactments has been well settled by this Court. *Brinkerhoff-Faris Trust and Savings Company* v. *Hill,* 281 U. S. 673, 680 (and cases cited).

(c) The State of Texas has further given its protection to the deprivation of petitioner's civil right to vote by the decision of the Supreme Court of Texas in *Bell* v. *Hill,* 74 S. W. (2d) 113, which holds that the deprivation is protected and guaranteed by the First Amendment to the Constitution of the United States and Sections 2 and 27 of Article 1 of the Constitution of Texas (pp. 119, 122).

II. The decision below is not in accord with the applicable decision of *Nixon* v. *Condon*, 286 U. S. 73.

Nixon v. *Condon* decided three propositions, two Federal questions of law and one question of fact inhering in and necessary to a decision of the Federal questions of law. These three propositions appear from the following three quotations from *Nixon* v. *Condon, supra:*

(1) "Whatever our conclusion might be if the statute had remitted to the party the untrammeled power to prescribe the qualifications of its members, nothing of the kind was done. Instead, the statute lodged the power in a committee, which excluded the petitioner and others of his race, *not by virtue of any authority delegated by the party, but by virtue of an authority originating or supposed to originate in the mandate of the law.*" (P. 84, Italics ours.)

(2) "The pith of the matter is simply this, that, *when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power.* They are then the governmental instruments whereby parties are organized and regulated to the end that government itself may be established or continued. What they do in that relation, they must do in submission to the mandates of equality and liberty that bind officials everywhere." (P. 88, Italics ours.)

(3) "*Whether in given circumstances parties or their committees are agencies of government within the Fourteenth or the Fifteenth Amendment is a question which this court will determine for itself. It is not concluded upon such an inquiry by decisions rendered elsewhere.* The test is not whether the members of the executive committee are the representatives of the State in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the State to

such an extent and in such a sense that the great restraints of the Constitution set limits to their action." (P. 88, Italics ours.)

Nixon v. *Condon, supra,* went off on the question of fact that, assuming a question of party membership to be involved, no authorized voice of the Democratic Party had yet spoken that Negroes could not be Democrats. Specifically, this Court held as a matter of fact, determined by "the fundamental postulates of party organization," that the Texas State Democratic Executive Committee was not such an authorized voice.

Petitioner contends that there is not properly involved in this case any question of party membership, but that, if there is, the instant case is on all-fours with *Nixon* v. *Condon, supra,* in that still no authorized voice of the Democratic Party has yet said that Negroes could not be Democrats; but that on the contrary, the supreme voice of the Democratic Party has, since the Texas State Democratic Convention passed the resolution involved in this case, dedicated that party to the Jeffersonian principle of "equal rights to all, special privileges to none."

(*a*) The Democratic Party is a *national political party;* it is not a *State political party.*

A few quotations from Bryce's The American Commonwealth will show beyond question this historical truth.

> "What constitutes a party? In America, there is a simple test. Any section of men who nominate candidates of their own for the presidency and vice-presidency of the United States are deemed a national party. Adopting this test, we shall find that there have lately been two or three *national parties in addition to the Republicans and Democrats.*" (Bryce, The American Commonwealth, Vol. 2, p. 41.) (Italics ours.)
>
> "We might therefore expect that the State parties would be as distinct from the national parties as are the State governments from the Federal.

"The contrary has happened. The national parties have engulfed the State parties. The latter have disappeared absolutely as independent bodies, and survive merely as branches of the national parties, working each in its own State for the tenets and purposes which a national party professes and seeks to attain." (Vol. 1, p. 572.)

"Accordingly, the national parties have complete possession of the field. In every State from Maine to Texas, all State elections for the governorship and other offices are fought on their lines; all State legislatures are divided into members belonging to one or other of them. Every trial of strength in a State election is assumed to presage a similar result in a national election. Every State office is deemed as fitting a reward for services to the national party as for services in State contests. *In fact, the whole machinery is worked exactly as if the State were merely a subdivision of the Union for electoral purposes.*" (P. 574, Italics ours.)

(*b*) The Democratic Party being a national political party, its supreme voice is the National Democratic Convention.

In *Nixon* v. *Condon, supra,* this Court said the following (p. 84):

"Whatever inherent power *a State political party* has to determine the content of its membership resides in the State convention. (Bryce, Modern Democracies, Vol. 2, p. 40.)" (Italics ours.)

On page 46 of the same authority (Bryce, Modern Democracies, Vol. 2), writing to the same point with reference to *national political parties,* Viscount Bryce says:

"In the United States the National Convention is the supreme exponent of party doctrine and policy, universally recognized as the party oracle."

Whatever inherent power the Democratic Party has, therefore, to determine the content of its membership resides, not in forty-eight separate and distinct and different State Democratic conventions, not even in the State Democratic Convention of Texas, as would be true if it were a State political party—but that inherent power, such as exists in America today, resides in the National Democratic Convention.

Any power which the State Democratic Convention of Texas may claim to determine the content of the membership of the Democratic Party must, therefore, necessarily come to it as a matter of delegation from the National Democratic Convention.

Petitioner alleged in his petition below that no power to exclude Negroes had been thus delegated (R. 11). The general demurrer (R. 13), of course, concedes this fact.

Not only has the National Democratic Convention not delegated any such power, but it closed its platform adopted at Chicago on June 27, 1932, (subsequent to May 24, 1932, the date of the resolution of the Texas State Democratic Convention confining membership in the Democratic Party to white people) with these words:

> "To accomplish these purposes and to recover economic liberty we pledge the nominees of this convention and the best effort of a great party whose founder announced the doctrine *which guides us now*, in the hour of our country's need '*equal rights to all, special privileges to none.*'" (World Almanac, 1933, p. 933.) (Italics ours.)

It is a matter of historical and general knowledge, too, that Negroes were seated in the National Democratic Convention of 1932.

It is also significant that the Texas State Democratic Convention which sought by the resolution involved in this case to confine membership in the Democratic Party to the

white race, was meeting pursuant to a Texas statute, Article 3167 of the Revised Civil Statutes of Texas, for the express and only purpose of electing delegates to this same National Democratic Convention of 1932. The Supreme Court of Texas states, in *Bell* v. *Hill, supra,* at p. 114, that such was the nature and purpose of the State Democratic Convention, which adopted the resolution involved in this case:

> "The petition states in substance, in part, that the respondents are denying or will deny, the relators the right to vote, because of a resolution passed by the State Convention of the Democratic Party in Texas on May 24, 1932, which reads: 'Be it resolved, that all white citizens of the State who are qualified to vote under the Constitution and laws of Texas shall be eligible for membership in the party, and as such eligible for participation in the primaries.'
>
> "This resolution was passed by the Democratic Convention which met at Houston for the purpose of electing delegates to the National Convention of the Democratic Party."

(*c*) The Texas State Democratic Convention had no inherent power by virtue of its being to say who may be Democrats and who may not.

"The National Convention is the supreme exponent of party doctrine and policy." Bryce, Modern Democracies, *supra.* As explained in Bryce's The American Commonwealth, *supra,* the State convention in Texas is merely a branch or subdivision of the national party, and as such is vested only with the management of the party's affairs in a single State. Except when duly authorized by the supreme voice of the Democratic Party, which it was not in this case, it has no power to exercise the supreme inherent power of the Democratic Party. The reasons were plainly stated by this Court in *Nixon v. Condon, supra* (p. 86), as follows:

> "The management of the affairs of a group already associated together as members of a party is obviously a very different function from that of determining who the members of the group shall be. If another view were to be accepted, a committee might rule out of the party a faction distasteful to itself, and exclude the very men who had helped to bring it into existence."

Founded by Thomas Jefferson long prior even to the independence of Texas from Mexico, to say nothing of its statehood, the members of the Democratic party were already associated together as a party for several decades prior to the creation of the State Democratic Convention of Texas. It follows then that this State convention could not, *ipso facto,* and by its own *ipse dixit,* and merely by receiving the privilege of itself becoming a branch of the Democratic Party, suddenly ascend into possession by virtue of its being of all of the inherent powers of the party, with full authority to rule out even those who let the Texas State Democratic Convention into the Democratic Party.

(*d*) The Texas State Democratic Convention having neither delegated nor inherent power to make race and color a test for membership in the Democratic Party, it is inescapable that whatever power it has in this regard has come to it by virtue of Sections 2 and 27 of the Bill of Rights (Article 1) of the Texas Constitution, as construed by the Supreme Court of Texas in *Bell* v. *Hill,* 74 S. W. (2d) 113.

In *Nixon* v. *Condon, supra,* this Court held that the State Democratic Executive Committee was an agency of the State in depriving Negroes of their vote because that committee had "excluded petitioner and others of his race, not by virtue of any authority delegated by the party, but by virtue of an authority originating or supposed to originate in the mandate of the law."

The same is true of the Texas State Democratic Convention in the case at bar, and that convention is likewise, for the same reason, an agency of the State. Speaking of the convention's power, the Supreme Court of Texas said at page 122 of *Bell* v. *Hill, supra:*

> "We are clearly of the opinion that the resolution passed by the Democratic State Convention at Houston was a valid resolution under the power clearly guaranteed to that body by the Bill of Rights of this State." (Italics ours.)

In *Nixon* v. *Condon, supra,* this Court said of the same power claimed by the State Democratic Executive Committee, the following (p. 85):

> "If the State had not conferred it, there would be hardly color of right to give a basis for its exercise."

Likewise, when the State Democratic Convention of Texas arrogates unto itself this same power without authority from the supreme voice of the Democratic Party, petitioner respectfully submits that "if the State had not" *guaranteed* "it, there would be hardly color of right to give a basis for its exercise."

(*c*) This Court is not bound by decisions of the Supreme Court and Court of Civil Appeals of Texas holding that the Texas State Democratic Convention is not an agency of government.

In *Nixon* v. *Condon, supra,* this Court said the following (p. 88):

> "Whether in given circumstances, parties or their committees are agencies of government within the Fourteenth or the Fifteenth Amendment is a question which this court will determine for itself. *It is not concluded upon such an inquiry by decisions rendered elsewhere.*" (Italics ours.)

Not only is this ultimate Federal question open for review by this Court, but this Court may also decide for itself every other question which inheres in or is necessary to a proper decision of that Federal question. Such an incidental question is the question of whether the Texas State Democratic Convention, as a branch of the Democratic Party, has the inherent power by virtue of its being to make race and color a test of being a Democrat, in the very teeth of a subsequent declaration of the National Democratic Convention—which Viscount Bryce says is "the supreme exponent of party doctrine and policy"—dedicating the Democratic Party to a policy of "equal rights to all, special privileges to none."

The general principle of this Court's power and duty to decide for itself such questions has been recently restated by this Court through Mr. Chief Justice Hughes in *Sterling* v. *Constantin*, 287 U. S. 378, 397, as follows:

> "If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of State power would be but impotent phrases, the futility of which the State may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution. When there is a substantial showing that the exertion of state power has overridden private rights secured by the Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression. To such a case the Federal judicial power extends (Art. III, § 2) and, so extending, the court has all the authority ap-

propriate to its exercise. *Accordingly, it has been decided in a great variety of circumstances that when questions of law and fact are so intermingled as to make it necessary in order to pass upon the federal question, the court may, and should, analyze the facts. Even when the case comes to this Court from a State Court this duty must be performed as a necessary incident to a decision upon the claim of denial of Federal right.*" (Italics ours.)

In the more recent case of *Johnson Oil Refining Company* v. *Oklahoma*, 290 U. S. 158, 159, this Court said:

> "The Supreme Court of the State reached the conclusion that all the cars had their 'taxable situs' at the latter place. As the asserted Federal right turns upon the determination of the question of situs, it is our province to analyze the facts in order to apply the law, and thus to ascertain whether the conclusion of the state court has adequate support in the evidence."

Besides, the question involved is a question of general law and jurisprudence, and as to such questions this court has always reserved the right to exercise its own independent judgment.

Swift v. *Tyson*, 10 L. Ed. 865.
Burgess v. *Seligman*, 107 U. S. 20.
Sim v. *Edenborn*, 242 U. S. 131.
See also: *Barclay* v. *Hayes*, 208 Fed. 319.

III. Sections 2 and 27 of the Bill of Rights (Art. 1) of the Constitution of the State of Texas, as construed by the Supreme Court of Texas in *Bell* v. *Hill*, 74 S. W. (2d) 113, and as sustained by the judgment below in the case at bar, are unconstitutional for the reason that they deny to the classification of race and color the benefits which are guaranteed to the classifications of past party affiliations and membership or non-membership in organizations other than political parties by Article 3107 of the Revised Civil Stat-

utes of Texas as upheld by the Supreme Court of Texas in the case of *Love* v. *Wilcox*, 28 S. W. (2d) 515. The denial by the judgment of the court below of this claim of Federal right is not in accord with such decisions of this Court as *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60, and *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, holding that where one class is favored by exemptions denied to another class under the state law, there must be some reasonable basis for the classification thus established in order for it to meet the requirements of the equal protection clause of the Fourteenth Amendment.

That race and color cannot be made the basis of such a classification has been well settled by this Court:

> "States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case." (P. 541 of *Nixon* v. *Herndon, supra*).

It should be kept in mind also under this point that we are not dealing with a convention formed at the instance or suggestion of private individuals upon their own volition. But, on the contrary, as said by United States District Judge Kennerly in *White* v. *The County Democratic Executive Committee, supra*, "the convention itself is a creation of a statute which fixes the time of its meeting, the purpose of its meeting, and prescribes in detail the manner of choosing those who participate therein. Article 3167, Texas Revised Civil Statutes 1925." Moreover, as said by the Supreme Court of Texas in *Sterling* v. *Ferguson*, 53 S. W. (2d) 753, 760, the election involved is a "statutory primary election."

And it is in such a *statutory* election and to such a *statutory creature* that sections 2 and 27 of the Texas Bill of Rights guarantees the power to make race and color a

qualification and test of voting, while Article 3107 of the Revised Civil Statutes of Texas (held valid by the Texas Supreme Court in *Love* v. *Wilcox*, 28 S. W. (2d) 515) exempts from such discrimination the classifications of past party affiliations (the traditional test of party loyalty) and membership or non-membership in organizations other than the political party.

So, whatever may be the rights and privileges of men whose own minds and volitions bring them together, at a time, and in a manner, and for purposes which they themselves privately decide upon, it is obvious that the public wellfare demands a different standard of duty from men who meet together "by virtue of" and "under the terms of" a State statute (see *Bell* v. *Hill, supra*, pp. 114, 121), especially when, as such a "creation of a statute" they possess "power clearly guaranteed" (see *Bell* v. *Hill, supra*, p. 122) by the State law to make race and color a test of voting in a "statutory" election.

IV. The decision below is not in accord with the applicable decision of *United States* v. *Reese*, 92 U. S. 214, where construing the Fifteenth Amendment, this Court said (p. 218):

> "If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be."

In every instance where the managers of Statutory Democratic primary elections have sought to deny participation therein to white people upon grounds inconsistent with the qualifications and tests laid down in the constitution and laws of Texas, the Texas appellate courts have prevented the denial. For examples see the following cases:

Love v. *Wilcox*, 28 S. W. (2d) 515.

Briscoe v. *Boyle*, 286 S. W. 275.

Clancy v. *Clough*, 30 S. W. (2d) 569.

On the other hand, in every case where the managers of statutory Democratic primary elections have denied Negroes on account of race and color alone, the right to vote therein, the Texas appellate courts have upheld the deprivation. For examples, besides the case at bar, see the following cases:

Bell v. *Hill*, 74 S. W. (2d) 113.
White v. *Lubbock*, 30 S. W. (2d) 722.
County Democratic Executive Committee v. *Booker*, 53 S. W. (2d) 123.

Conclusion.

Because (*a*) the case comes to this Court from the highest court of Texas "in which a decision could be had", and (*b*) because the judgment of the State court below decided a Federal question of substance not theretofore decided by this Court—a Federal question which this Court expressly left open in *Nixon* v. *Condon* "until decision becomes necessary," and (*c*) because the judgment of the State court below is not in accord with the applicable decisions of this Court set forth and discussed above in this brief, and (*d*) because the questions involved in this case are of great public interest, affecting, as they do, the franchise rights of approximately one-sixth of the population of Texas and approximately one-third of the population of the South, petitioner prays that this Court may exercise its discretion favorably by granting the writ of certiorari applied for in this case.

Respectfully submitted,

J. Alton Atkins,
Carter W. Wesley,
Counsel for Petitioner.

A. S. Wells,
F. S. K. Whittaker,
Of Counsel.

APPENDIX 1.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION

No. 994. Law.

L. A. NIXON, Plaintiff

vs.

C. C. HERNDON AND CHARLES PORRAS, Defendants

Now, on this 1st day of February, A. D. 1928, at a regular term of this court came on regularly to be heard the above styled and numbered cause. The plaintiff, L. A. Nixon, appeared in person and by counsel and announced ready for trial, and the defendants, C. C. Herndon and Chas. Porras, having been duly and legally served with notice, appeared not, but wholly made default. Whereupon came the jury, composed of Jake Kaufman and eleven other good and lawful men, who were impanelled and sworn to try the issues in said cause, and after having heard the pleadings read, and the evidence submitted by the plaintiff, and the argument of counsel, the court instructed the jury to find the issues in favor of the plaintiff, and the jury returned the following verdict: "We, the jury under instructions of the court, find for the plaintiff L. A. Nixon, against the defendants, C. C. Herndon and Chas. Porras, in the sum of one dollar. Jake Kaufman, Foreman."

And in accordance therewith the Court doth find: That the law and the evidence is with the plaintiff; that the plaintiff was denied the right to vote at the Primary Election on July 26, 1924, for candidates for office upon the Democratic ticket, by the defendants, and that said refusal was a denial to the plaintiff of his rights, and that plaintiff is damaged, and the Court finds his measure of damages to be $1.00.

It is therefore ordered, adjudged and decreed by the court that the plaintiff, L. A. Nixon, have and recover of and from the defendants, C. C. Herndon and Charles Porras, the sum of $1.00, and costs of suit. For which let execution issue.

(Signed) Charles A. Boynton, Judge.

Endorsed: No. 994. In the District Court of the United States Western District of Texas, El Paso Division. L. A. Nixon, Plaintiff, vs. C. C. Herndon and Charles Porras, Defendants. Judgment. Filed Feb. 1, 1928 (El Paso Division). D. H. Hart, Clerk, U. S. District Court, West. Dist. of Texas, by (signed) Flora L. Linker, Deputy Clerk. Volume 20, page 108.

UNITED STATES OF AMERICA
Western District of Texas, ss:

I, D. H. Hart, Clerk of the District Court of the United States of America for the Western District of Texas, do hereby certify that the foregoing on 1½ pages, is a true and correct copy of the Judgment in cause No. 994-Law, styled L. A. Nixon, Plaintiff, vs. C. C. Herndon and Charles Porras, Defendants, as the same appears on file and of record in this office.

Witness my official signature and the seal of said Court hereto affixed, at office in the City of El Paso, Texas, this 16th day of October, A. D. 1934.

D. H. Hart, Clerk, by Margarita Gameros, Deputy Clerk. (Seal U. S. District Court, Western District of Texas, El Paso.)

APPENDIX 2.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION.

No. 1379. Law.

L. A. NIXON, Plaintiff,

vs.

JAMES CONDON and C. H. KOLLE, Defendants.

This cause coming on to be heard on this the 15th day of October, A. D. 1932, in open court, the plaintiff being present in person and by his attorneys, Fred C. Knollenberg and E. F. Cameron, and the defendants being present by their attorney, Ben R. Howell, and a jury being waived, all matters of fact as well as of law was submitted to the court; and the court having heard the pleadings read, and being fully advised in the premises doth find that the law and the facts are with the plaintiff who is entitled to recover a judgment against the defendants for having been deprived of his right to vote in the Democratic Primaries, thereupon the attorneys announced in court that they had agreed that a judgment might be rendered for the amount of One Dollar ($1.00).

It is, therefore, ordered, adjudged and decreed that plaintiff, L. A. Nixon, have and recover of and from James Condon and C. H. Kolle the sum of One Dollar ($1.00) and all costs in this cause incurred.

(Signed) Charles A. Boynton, Judge. Form O. K. Howell.

Endorsed: No. 1379—Law. In the District Court of the United States for the Western District of Texas, El Paso Division. L. A. Nixon, Plaintiff, vs. James Condon and C. H. Kolle, Defendants. Judgment. Filed October 15, 1932. D. H. Hart, Clerk, by (signed) J. F. Caroline, Deputy. Volume 27, page 391.

UNITED STATES OF AMERICA,
Western District of Texas, ss:

I, D. H. Hart, Clerk of the District Court of the United States of America for the Western District of Texas, do hereby certify that the foregoing, on one page, is a true and correct copy of the Judgment in cause No. 1379—Law, styled L. A. Nixon, Plaintiff, vs. James Condon and C. H. Kolle, Defendants, as the same appears on file and of record in this office.

Witness my official signature and the seal of said Court hereto affixed, at office in the City of El Paso, Texas, this 16th day of October, A. D. 1934.

D. H. Hart, Clerk, by Margarita Gameros, Deputy Clerk. (Seal U. S. District Court, Western District of Texas, El Paso.)

APPENDIX 3.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION.

October Term, A. D. 1933.

No. 1660. Law.

L. A. NIXON, Plaintiff,

v.

GEORGE L. McCANN and FRANK BRENK, Defendants.

This cause coming on to be heard on this the 7th day of February, A. D. 1934, and all parties having heretofore filed a written stipulation waiving a jury and agreeing to submit all matters of fact, as well as of law, to the court, and in open court announced ready for trial;

And the court having heard the pleadings read and the evidence submitted and the arguments in support thereof, is of the opinion that the law and the evidence is with the plaintiff and he ought to have and recover of and from

the defendants his damages against the defendants in the sum of Five Dollars.

It is, therefore, ordered, adjudged, and decreed, that plaintiff have and recover of and from the defendants judgment in the sum of Five Dollars, together with all costs of this proceeding, for which let plaintiff have his execution.

Done, at El Paso, Texas, at this the October Term, A. D. 1933.

(Signed) Charles A. Boynton, Judge. Approved: Ben R. Howell, R. L. Holliday, Atty's. for Def't.

Endorsed: No. 1660—Law. L. A. Nixon vs. George L. McCann and Frank Brenk. Judgment. Filed for record February 7, 1934 (El Paso Division). D. H. Hart, Clerk, U. S. District Court, West. Dist. of Texas, by (signed) Flora L. Linker, Deputy Clerk. Volume 29, page 569.

UNITED STATES OF AMERICA,
Western District of Texas, ss:

I, D. H. Hart, Clerk of the District Court of the United States of America for the Western District of Texas, do hereby certify that the foregoing, on one page, is a true and correct copy of the Judgment in cause No. 1660—Law, styled L. A. Nixon, plaintiff, vs. George L. McCann and Frank Brenk, as the same appears on file and of record in this office.

Witness my official signature and the seal of said Court hereto affixed, at office in the City of El Paso, Texas, this 16th day of October, A. D. 1934.

D. H. Hart, Clerk, by Margarita Gameros, Deputy Clerk. (Seal U. S. District Court, Western District of Texas, El Paso.)

APPENDIX 4.

Sections 8, 16, and 19 of Article 5, Constitution of Texas:

"SEC. 8. The District Court shall have original jurisdiction in all criminal cases of the grade of felony; in all suits in behalf of the State to recover penalties, forfeitures

and escheats; of all cases of divorce; of all misdemeanors involving official misconduct; of all suits to recover damages for slander or defamation of character; of all suits for trial of title to land and for the enforcement of liens thereon; of all suits for the trial of the right of property levied upon by virtue of any writ of execution, sequestration or attachment when the property levied on shall be equal to or exceed in value five hundred dollars; of all suits, complaints or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars exclusive of interest; of contested elections, and said court and the judges thereof, shall have power to issue writs of habeas corpus, mandamus, injunction and certiorari, and all writs necessary to enforce their jurisdiction.

"The District Court shall have appellate jurisdiction and general control in probate matters, over the County Court established in each county, for appointing guardians, granting letters testamentary and of administration, probating wills, for settling the accounts of executors, administrators and guardians, and for the transaction of all business appertaining to estates; and original jurisdiction and general control over executors, administrators, guardians and minors under such regulations as may be prescribed by law. The District Court shall have appellate jurisdiction and general supervisory control over the County Commissioners Court, with such exceptions and under such regulations as may be prescribed by law; and shall have general original jurisdiction over all causes of action whatever for which a remedy or jurisdiction is not provided by law or this Constitution, and such other jurisdiction, original and appellate, as may be provided by law. (Sec. 8, Art. 5, adopted election August 11, 1891; proclamation September 22, 1891.)"

"Sec. 16. The County Court shall have original jurisdiction of all misdemeanors of which exclusive original jurisdiction is not given to the Justices Court as the same is now or may hereafter be prescribed by law, and when the fine to be imposed shall exceed $200, and they shall have exclusive jurisdiction in all civil cases when the matter in

controversy shall exceed in value $200, and not exceed $500, exclusive of interest, and concurrent jurisdiction with the District Court when the matter in controversy shall exceed $500, and not exceed $1,000, exclusive of interest, but shall not have jurisdiction of suits for the recovery of land. They shall have appellate jurisdiction in cases civil and criminal of which Justices Courts have original jurisdiction, but of such civil cases only when the judgment of the court appealed from shall exceed $20, exclusive of cost, under such regulations as may be prescribed by law. In all appeals from Justices Courts there shall be a trial *de novo* in the County Court, and appeals may be prosecuted from the final judgment rendered in such cases by the County Court, as well as all cases civil and criminal of which the County Court has exclusive or concurrent or original jurisdiction of civil appeals in civil cases to the Court of Civil Appeals and in such criminal cases to the Court of Criminal Appeals, with such exceptions and under such regulations as may be prescribed by law.

"The County Court shall have the general jurisdiction of a Probate Court; they shall probate wills, appoint guardians of minors, idiots, lunatics, persons *non compos mentis* and common drunkards, grant letters testamentary and of administration, settle accounts of executors, transact all business appertaining to deceased persons, minors, idiots, lunatics, persons *non compos mentis* and common drunkards, including the settlement, partition and distribution of estates of deceased persons and to apprentice minors, as provided by law; and the County Court, or judge thereof, shall have power to issue writs of injunctions, mandamus and all writs necessary to the enforcement of the jurisdiction of said Court, and to issue writs of *habeas corpus* in cases where the offense charged is within the jurisdiction of the County Court, or any other court or tribunal inferior to said Court. The County Court shall not have criminal jurisdiction in any county where there is a Criminal District Court, unless expressly conferred by law, and in such counties appeals from Justices Courts and other inferior courts and tribunals in criminal cases shall be to the Criminal District Court, under such regulations as may be prescribed by law; and in all such cases an appeal shall lie

from such District Court to the Court of Criminal Appeals. When the judge of the County Court is disqualified in any case pending in the County Court the parties interested may, by consent, appoint a proper person to try said case, or upon their failing to do so a competent person may be appointed to try the same in the county where it is pending in such manner as may be prescribed by law. (Sec. 16, Art. 5, adopted election August 11, 1891; proclamation September 22, 1891.)"

"SEC. 19. Justices of the peace shall have jurisdiction in criminal matters of all cases where the penalty or fine to be imposed by law may not be more than for two hundred dollars, and in civil matters of all cases where the amount in controversy is two hundred dollars or less, exclusive of interest, of which exclusive original jurisdiction is not given to the District or County Courts; and such other jurisdiction, criminal and civil, as may be provided by law, under such regulations as may be prescribed by law; and appeals to the County Courts shall be allowed in all cases decided in Justices' Courts where the judgment is for more than twenty dollars exclusive of costs; and in all criminal cases under such regulations as may be prescribed by law. And the justices of the peace shall be *ex officio* notaries public. And they shall hold their courts at such times and places as may be provided by law."

APPENDIX 5.

Articles 1906-1911, Revised Civil Statutes of Texas.

Article 1906. (1705) (1098) (1117) Original jurisdiction.

"The district court shall have original jurisdiction in civil cases of:

"1. Suits in behalf of the State to recover penalties, forfeitures and escheats.

"2. Cases of divorce and dissolution of marriage.

"3. Suits to recover damages for slander or defamation of character.

"4. Suits for the trial of title to land and for the enforcement of liens thereon.

"5. Suits for trial of right to property levied on by virtue of any writ of execution, sequestration or attachment, when the property levied on shall be equal to or exceed in value five hundred dollars.

"6. Suits, complaints or pleas, without regard to any distinction between law and equity, when the matter on controversary (controversy) shall be valued at or amount to five hundred dollars exclusive of interest.

"7. Contested elections. (Const., Art. 5.)"

Art. 1907. (1706) (1099) (1118) Matters of Probate.

"District courts shall have appellate jurisdiction and general control in probate matters over the county courts, for appointing guardians, granting letters testamentary and of administration, probating wills, settling accounts of executors, administrators and guardians, and for the transaction of business appertaining to estates. The district court shall also have such original jurisdiction and general control over executors, administrators, guardians and minors as provided by law. (Const., Art. 5, sec. 8; Acts 1846, p. 200; P. D. 1406; Amendment 1891.)"

Art. 1908. (1706) (1099) (1118) Over Commissioners Court.

"Such court shall also have appellate jurisdiction and general supervisory control over the commissioners court, with such exceptions and under such regulations as may be prescribed by law. (Id.)"

Art. 1909 (1706) (1099) (1118) General Jurisdiction.

"Such court shall have general original jurisdiction over all causes of action for which a remedy or jurisdiction is not provided by law or the constitution, and such other jurisdiction, original and appellate as may be provided by law. (Const., Art. 5, sec. 8; Acts 1846, p. 22; P. D. 1406.)"

Art. 1910. (1707) (1100) (1119) Motions against sheriffs, attorneys, etc.

"The district court shall have power to hear and determine all motions against sheriffs and other officers of the

court for failure to pay over moneys, collected under the process of said court, or other defalcation of duty in connection with such process and of motions against attorneys for moneys collected by them and not paid over. (Acts 1846, p. 201, sec. 5; P. D. 1408; G. L., Vol. 2, p. 1507.)"

Art. 1911. (1708) (1101) (1120) May punish for contempt.

"The district court may punish any person guilty of contempt of such court by fine not exceeding one hundred dollars, and by imprisonment not exceeding three days. (Acts 1846, p. 201; P. D. 1409; G. L., Vol. 2, p. 1507.)"

APPENDIX 6.

Articles 1949-1960, Revised Civil Statutes of Texas.

Article 1949. (1763) (1154) (1161) Exclusive original jurisdiction.

"The county court shall have exclusive original jurisdiction in civil cases where the matter in controversary (controversy) shall exceed in value two hundred dollars, and shall not exceed five hundred dollars, exclusive of interest. (Const., Art. 5, sec. 16; Acts 1876, p. 172; G. L., Vol. 8, p. 1008.)"

Art. 1950. (1764) (1155) (1162) Concurrent original jurisdiction.

"The county court shall have concurrent jurisdiction with the district court when the matter in controversy shall exceed five hundred and not exceed one thousand dollars, exclusive of interest. (Id.)"

Art. 1951. (1766) (1157) (1164) No jurisdiction.

"The county court shall not have jurisdiction of any suit to recover damages for slander or defamation of character, nor of suits of the recovery of lands, nor suits for the enforcement of liens upon land, nor of suits in behalf of the

State for escheats, nor of suits for divorce, nor of suits for the forfeiture of the charters of corporations and incorporated companies, nor of suits for the trial of the right to property levied on by virtue of any writ of execution, sequestration or attachment, when the property levied on shall be equal to or exceed in value five hundred dollars. (Id.)"

Art. 1952. (1767) (1158) (1165) Appellate jurisdiction.

"The county court shall have appellate jurisdiction in civil cases over which the justice courts have original jurisdiction when the judgment appealed from or the amount in controversy shall exceed twenty dollars exclusive of costs. (Id.)"

Art. 1953. (1768) (1159) (1166) Certiorari to justice courts.

"The county court shall also have jurisdiction in cases brought up from the justice courts by certiorari."

Art. 1954. (1769) (1160) (1167) Motions against officers.

"The county court may hear and determine all motions against sheriffs and other officers of the court for failure to pay over moneys collected under the process of said court, or other defalcation of duty in connection with such process. (Acts 1876, p. 23; G. L., Vol. 8, p. 859.)"

Art. 1955. (1770) (1161) (1168) To punish for contempt.

"The county court may punish, by fine not exceeding one hundred dollars, and by imprisonment not exceeding three days, persons guilty of contempt of such court. (Acts 1846, p. 200; P. D. 1409; G. L., Vol. 2, p. 1506.)"

Art. 1956. (1771) (1169) Law and equity powers.

"Subject to the limitation stated in this chapter, the county court is authorized to hear and determine any cause which is cognizable by courts, either of law or equity, and to grant any relief which could be granted by said courts, or either of them. (Id.; P. D. 1410.)"

Art. 1957. (1772) (1163) (1170) To grant remedial writs.

"The county judge, either in term time or vacation, may grant writs of mandamus, injunction, sequestration, attachment, garnishment, certiorari and supersedeas, and all other writs necessary to the enforcement of the jurisdiction of the court. (Const., Art. 5, sec. 16; Acts 1876, p. 19; G. L., Vol. 8, p. 855.)"

Art. 1958. (1773) (1164) (1171) Appointing attorneys.

"The county judge may appoint counsel to attend to the cause of any party who makes affidavit that he is too poor to employ counsel to attend to the same. (Acts 1846, p. 200, sec. 11; P. D. 1414; G. L., Vol. 2, 1506.)"

Art. 1959. (1774) (1165) (1172) Additional authority.

"The county court and the county judge shall also have such authority as may be vested in them by law."

Art. 1960. (1775) (1166) Changed jurisdiction; eminent domain.

"Where the jurisdiction of a county court has been taken away, altered or changed by existing laws, the same shall remain as established, until otherwise provided by law. Jurisdiction shall obtain in all matters of eminent domain over which the county courts have jurisdiction by the general laws of this State. (Acts 1885, p. 77; G. L., Vol. 9, p. 697.)"

APPENDIX 7.

Articles 2385-2387, 2454, 2460, Revised Civil Statutes of Texas.

Art. 2385. (2291) (1568) (1539) Jurisdiction.

"Justice courts shall, in addition to their other powers and duties, have and exercise original jurisdiction in civil matters of all cases where the amount in controversy is two hundred dollars, or less, exclusive of interest, of which ex-

clusive original jurisdiction is not given to the district or county courts, and of cases of forcible entry and detainer, and to foreclose mortgages and enforce liens on personal property, where the amount in controversy is within their jurisdiction. (Const., Art. 5, sec. 19; Acts 1876, p. 155; G. L., Vol. 8, p. 991.)"

Art. 2386. (2293-4-5-7) Other powers.

"Justices of the peace shall also have power:

"1. To punish any party guilty of a contempt of court by fine not to exceed twenty-five dollars and by imprisonment not exceeding one day.

"2. To issue writs of attachment, garnishment and sequestration within their jurisdiction, the same as judges and clerks of the district and county courts.

"3. To exercise jurisdiction over all other matters not hereinbefore enumerated that are or may be cognizable before a justice of the peace under any law of this State.

"4. To proceed with all unfinished business of his office in like manner as if such business had been originally commenced before him."

Art. 2387. (2296) (1573) (1544) No jurisdiction.

"Justice courts have no jurisdiction of suits in behalf of the State to recover penalties, forfeitures and escheats, of suits for divorce, of suits to recover damages for slander or defamation of character, suits for the trial of title to land, or of suits for the enforcement of liens on land. (Const., Art. 5, sec. 8.)"

Art. 2454. (2391) (1668) (1638) Appeal.

"A party to a final judgment in any justice court may appeal therefrom to the county court where such judgment, or the amount in controversy, shall exceed twenty dollars exclusive of costs, and in such other cases as may be expressly provided by law. (Acts 1876, p. 154; G. L., Vol. 8, p. 990.)

Art. 2460. (2398-99) Certiorari.

"A cause tried before a justice, wherein the amount in controversy or the judgment exceeds twenty dollars, exclu-

sive of costs, may be removed from such justice court to the county court by certiorari under the rules prescribed in the title and chapter relating thereto. Whenever a writ of certiorari to remove any cause from the justice court to the county court shall be served on any justice of the peace, he shall immediately make out a certified copy of the entries made on his docket, and of the bill of costs, as provided in case of appeals, and send same, together with the original papers in the cause, to the clerk of the county court in the manner and within the time prescribed in the preceding article."

APPENDIX 8.

Sections 3 and 6 of Article 5, Constitution of Texas.

"Sec. 3. The Supreme Court shall have appellate jurisdiction only except as herein specified, which shall be coextensive with the limits of the State. Its appellate jurisdiction shall extend to questions of law arising in cases of which the Courts of Civil Appeals have appellate jurisdiction under such restrictions and regulations as the Legislature may prescribe. Until otherwise provided by law the appellate jurisdiction of the Supreme Court shall extend to questions of law arising in the cases in the Courts of Civil Appeals in which the Judges of any Court of Civil Appeals may disagree, or where the several Courts of Civil Appeals may hold differently on the same question of law or where a Statute of the State is held void. The Supreme Court and the Justices thereof shall have the power to issue writs of habeas corpus, as may be prescribed by law, and under such regulations as may be prescribed by law, the said courts and the Justices thereof may issue the writs of mandamus, procedendo, certiorari and such other writs, as may be necessary to enforce its jurisdiction. The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State.

"The Supreme Court shall also have power, upon affidavit or otherwise as by the court may be determined, to ascertain such matters of fact as may be necessary to the proper exercise of its jurisdiction. The Supreme Court shall sit for the transaction of business from the first Monday in October of each year until the last Saturday of June in the next year, inclusive, at the capital of the State.

"The Supreme Court shall appoint a clerk, who shall give bond in such manner as is now or may hereafter, be required by law, and he may hold his office for four years and shall be subject to removal by said court for good cause entered of record on the minutes of said court who shall receive such compensation as the Legislature may provide. (Sec. 3, Art. 5, adopted election August 11, 1891; proclamation September 22, 1891)."

"Sec. 6. The Legislature shall as soon as practicable after the adoption of this amendment divide the State into not less than two nor more than three Supreme Judicial districts and thereafter into such additional districts as the increase of population and business may require, and shall establish a Court of Civil Appeals in each of said districts, which shall consist of a Chief Justice and two Associate Justices, who shall have the qualifications as herein prescribed for Justices of the Supreme Court. Said Court of Civil Appeals shall have appellate jurisdiction coextensive with the limits of their respective districts, which shall extend to all civil cases of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law. Provided, that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error.

"Each of said Courts of Civil Appeals shall hold its sessions at a place in its district to be designated by the Legislature, and at such time as may be prescribed by law. Said Justices shall be elected by the qualified voters of their respective districts at a general election, for a (a) term of six years and shall receive for their services the sum of three thousand five hundred dollars per annum, until other-

wise provided by law. Said courts shall have such other jurisdiction, original and appellate, as may be prescribed by law. Each Court of Civil Appeals shall appoint a clerk in the same manner as the clerk of the Supreme Court which clerk shall receive such compensation as may be fixed by law.

"Until the organization of the Courts of Civil Appeals and Criminal Appeals, as herein provided for, the jurisdiction, power and organization and location of the Supreme Court, the Court of Appeals and the Commission of Appeals shall continue as they were before the adoption of this amendment.

"All civil cases which may be pending in the Court of Appeals shall as soon as practicable after the organization of the Courts of Civil Appeals be certified to, and the records thereof transmitted to the proper Courts of Civil Appeals to be decided by said courts. At the first session of the Supreme Court the Court of Criminal Appeals and such of (of) the Courts of Civil Appeals which may be hereafter created under this article after the first election of the Judges of such courts under this amendment. The terms of office of the Judges of each court shall be divided into three classes. Those who shall draw class No. 1 shall hold their offices two years, those drawing class No. 2 shall hold their offices for four years, and those who may draw class No. 3 shall hold their offices for six years, from the date of their election and until their successors are elected and qualified, and thereafter each of the said Judges shall hold his office for six years, as provided in this Constitution. (Sec. 6, Art. 5, adopted election August 11, 1891; proclamation September 22, 1891.)"

APPENDIX 9.

Articles 1728 and 1819, Revised Civil Statutes of Texas.

"Art. 1728 (1521) (940) (1011) Appellate jurisdiction.

The Supreme Court shall have appellate jurisdiction coextensive with the limits of the State, extending to all questions of law arising in the following cases when same have

been brought to the Courts of Civil Appeals from final judgment of trial courts:

"1. Those in which the judges of the Courts of Civil Appeals may disagree upon any question of law material to the decision.

"2. Those in which one of the Courts of Civil Appeals holds differently from a prior decision of its own, or of another Court of Civil Appeals, or of the Supreme Court upon any question of law.

"3. Those involving the construction or the validity of statutes necessary to a determination of the case.

"4. Those involving the revenues of the State.

"5. Those in which the Railroad Commission is a party.

"6. In any other case in which it is made to appear that an error of substantive law has been committed by the Court of Civil Appeals which affects the judgment, but excluding those cases in which the jurisdiction of the Court of Civil Appeals is made final by statute.

"In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court shall refuse the application; in all cases where the judgment of the Court of Civil Appeals is a correct one but the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, it shall dismiss the case for want of jurisdiction.

"Provided further that in cases of conflict named in Subdivision 2 above, the Supreme Court may, in its discretion, refuse the writ of error where the court is in agreement with the decision of the Court of Civil Appeals in the case in which the application is filed; and in cases of such conflict with a previous opinion of the Supreme Court, the Supreme Court may, in its discretion, without the necessity of granting the writ and hearing the case, reverse and remand the same on the application for writ of error." (Acts 1927, 40th Leg., p. 214, ch. 144.)

"Art. 1819. (1589), (996). Jurisdiction defined.

The appellate jurisdiction of the Courts of Civil Appeals shall extend to all civil cases within the limits of their respective districts of which the District Courts and County Courts have or assume jurisdiction when the amount in controversy or the judgment rendered shall exceed One Hundred Dollars exclusive of interest and costs." (As amended Acts 1929, 41st Leg., p. 68, ch. 33, § 1.)

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